

THE ROLE OF THE PUBLIC AS A REGULATORY ACTOR IN THE CONTEXT OF CLIMATE CHANGE REGULATION

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This article looks at the role that public interest has played in relation to climate change regulatory policy. Government has used the public as a regulatory force to pressure and influence the behaviour of private commercial interest on the issue of climate change. This manipulation by government has taken place under the guise of 'do it yourself' measures such as offsetting. The purpose has been to engineer an alignment of government and private interest so that the imposition of legislation mandating reduction in emissions might be easier to implement and justified in the name of a political mandate emanating from public desire for change. The inclusion of the public interest in this policy lends credibility and legitimacy to government initiatives. The process of establishing legislation mandating a reduction in emissions has begun and a compelling issue is whether government after endorsing the application of public pressure onto private interest is willing to allow the public to in turn scrutinise the legitimacy of such direct regulation. These concerns will strike at the heart of the credibility of government's attempts to centralise regulation of greenhouse gas emissions and climate change policy.

I INTRODUCTION: FRAMING THE DEBATE

A number of observers have focused on various governments' failure to provide regulatory leadership on the issue of climate change. The research into public efforts to try to compensate for this regulatory gap has in no small part inspired this paper. These efforts are manifested in two principal ways: i) action through the courts¹ and ii) pressure brought to bear upon private commercial and business interest to disclose carbon liability.² While much has been said about the consequences of specific governments' recalcitrance this article focuses upon the gap between climate change rhetoric and policy – specifically whether the gap is being closed and how this might change our perceptions of the role played by government. In many developed countries legislation to cut greenhouse gas (GHG)

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¹ For a discussion of recent climate change litigation in Australia see J Peel 'The role of climate change litigation in Australia's response to global warming' (2007) 24 *Environment and Planning Law Journal* 90.

² For a discussion of this topic see K Bubna-Litic 'Climate change and corporate social responsibility: The intersection of corporate and environmental law' (2007) 24 *EPLJ* 253.

emissions has slowly been gathering pace. The momentum that has been building must be seen in the context of a greater climate change policy framework. The timing of these latest legislative forays is advantageous. Governments have formulated policy to manufacture or manipulate circumstances to create the optimal situation where new GHG legislation could be introduced. The reasons cited for government delay on introducing GHG reduction legislation generally include economic and political concerns and whilst the significance of these aspects is not to be downplayed this paper will introduce another factor – social implications. It has been argued that the government has been reluctant to act without a strong political mandate from their respective constituencies.³ Some fear that such a push will only arrive when much of the damage associated with climate change has occurred and is, in some respects, irreversible. Despite the general consensus among the public that climate change is occurring and that mankind is a strong contributor it is arguable that decision makers do not feel that social outcry has provided government with sufficient backing to assume leadership on the issue and drag society into a green future. Government regulatory policy however has managed to utilise this growing public discontent and by doing so create a situation where the prospect of GHG reduction legislation is much more palatable, especially to business interests. This type of approach has been observed in regulatory approaches in other sectors, but climate change presents a novel problem due to the ‘global’ nature of GHG emissions. The cause of GHG emissions is not restricted or isolated to a particular group, sector, time or place. Virtually all members of society contribute to the problem in some way. Therefore, it is difficult to regulate because changing behaviour must occur on a massive scale as so many different actors are in some way responsible.

Essentially government has enrolled the general public in its overall regulatory plan. Whether the public is enrolled as a regulatory actor or public pressure is simply an effect of regulation is debatable but the point remains – government has used the moral and ethical concerns of the general public to great effect. Government policy constantly reminds the general public that as consumers they have an ethical and moral responsibility to help reduce GHG emissions in any way possible. It goes further by highlighting techniques that give the public a feeling that they are empowered to actually make a difference such as ‘offsetting’, ‘reducing carbon footprints’ and green consumerism. The notion that such small actions including placing your TV on standby can genuinely make a difference imbues the public with an idea of satisfaction but also expectation. This sense amongst consumers that change is desirable and achievable is then carried into the market place, affecting the relationship between the public and private business. The relationship is affected by the sentiment that business needs to do more to act in accordance with the public’s moral and ethical standards on climate change responsibility. This pressure can manifest itself in a number of ways including calls for disclosure of carbon liability, green consumerism, socially responsible

³ J Aglionby, ‘Climate change debate needs revolution’, *Financial Times* (5 September 2007), <http://www.ft.com/cms/s/0/fc27a844-5b56-11dc-8c32-0000779fd2ac.dwp_uuid=728a07a0-53bc-11db-8a2a-0000779e2340.html> at 12 September 2007.

investment and private legal action. Government benefits from this effect because as public pressure builds private business is compelled to bring its interests more in line with that of the public. The underlying purpose is that regulation, in this case legislation mandating cuts in GHG emissions, will be easier to impose where private and public interests are more closely aligned. In the present circumstances an informed public has helped pressure private interest into adopting a more proactive view on the fight against climate change. This has significantly influenced the attitude within industry and helped to foster an atmosphere where legislation regulating GHG emissions will not be greeted with open hostility. I am not suggesting that public pressure is the only motivating factor, for example industry self interest is of fundamental importance, but the public role has not been properly examined as an aspect of regulation and change.

The first section of this paper examines the idea of enrolling the public as a regulatory actor in the overall policy mix. It looks at various theoretical aspects of the regulatory debate focusing particularly on the de-centralised approach. This section will also analyse how the public is enrolled, what its functions is and how it is expected to perform its role. The argument will use this framework in relation to current climate change policy by looking at the effectiveness of measures such as 'carbon offsetting' and ask the question whether the public has been successfully conscripted to support government goals.

The focus of the next section will be actions taken by the public. This part of the paper will pay particular regard to the scope of actions from reducing carbon footprints through to a recent increase in private litigation and the heightened calls by stakeholders for corporate carbon disclosure. These actions highlight the importance placed on the access to and provision of information regarding carbon liability. Such information is used as a basis for determining which companies have high risk carbon liabilities. This in turn can have a negative impact upon reputation and investment prospects. It therefore becomes financially as well as ethically responsible for a company to comply with social values regarding GHG emissions.

The final section of the paper looks at some of the emerging legislative attempts to regulate GHG emissions. Different schemes from a number of nations will be considered. Some policies focus on reduction targets for GHG emissions, while others focus on renewable energy targets and others still on carbon reporting. All the proposed legislation shares a common aspect in the sense that each policy invests climate change regulation in the government. A relevant question is how such a centralised approach will fit into the 'policy mix' that has characterised climate change regulatory policy. A key issue is whether the public's role as a regulatory actor could dissipate.

II ENROLLING THE PUBLIC AS A REGULATORY AGENT

The capacity for an individual citizen or the public at large to act as a regulatory agent is not universally recognised in some more traditional views of regulation.

Theories that focus exclusively upon the ability of the government or state to influence or modify behaviour are outmoded. This article utilises the more encompassing de-centred approach to regulation and subscribes to the definition of regulation provided by one of the theory's founders Julia Black:

Regulation...is...the sustained and focused attempt to alter the behavior of others according to defined standards or purpose with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information-gathering and behavior modification.⁴

The de-centred approach to regulation allows us to explore the wider array of actors and forces that are in some part responsible for influencing and changing behaviour.⁵ It allows regulatory analysis to break free of the confinements of legally backed sanctions and understand the importance of interactions between different actors in a regulatory landscape. Gunningham and Grabosky use the idea of regulation to include all forms of social control, including the general public, which might be relevant to solving a particular social problem.⁶

Bjorn Stigson, head of the World Business Council for Sustainable Development, recently remarked that nothing short of a revolution will provide the political mandate that will cause governments to enact legislation aimed at producing significant cuts in GHG emissions.⁷ He fears that by the time this occurs the damage caused by climate change will already be severe.⁸ This perceived need for a political mandate is traced back to a classic regulatory dilemma in the context of environmental policy. Government-based regulation faces a bigger challenge in terms of achieving its objectives if public and private positions are vastly different. A study conducted into quasi-regulators in US environmental policy observed:

[The] need for government intervention will largely depend upon the extent to which there is a strong natural coincidence between the public and private interest or the extent to which this has been created by private external pressures such as consumer or environmental groups.⁹

Creating a situation that is more amenable to state-centric regulation aimed at enforcing specific reduction targets requires behaviour modification on behalf of private interest. This will require a number of different changes in policy and practices, including (but by no means limited to) switching to renewable energy,

⁴ J Black, "Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation" [2003] *Public Law* 63, 65.

⁵ For a comprehensive discussion of this topic see, J Black, "Decentring Regulation: Understanding the role of regulation and self regulation in a 'post-regulatory' world" (2001) 54 *CLP* 103.

⁶ See Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy*, (1999, Oxford University Press).

⁷ Quoted in Aglionby, above n 3.

⁸ Ibid.

⁹ Holmes S, *Some Lessons from the Use of Environmental Quasi-Regulation in North America*, Office of Regulation Review, Industry Commission, Canberra (1997) p 13.

sponsoring research into sustainable development and energy efficiency. The process to change such behaviour centres on external pressure brought to bear by an informed, motivated public. An important part of government's role is the provision of information to the public, which can be made available through something as simple as a web based guide to offsetting or a comprehensive disclosure document outlining a company's carbon liability.

When the enrolment of actors is considered, it is necessary to keep in mind that certain actors are well placed to perform some regulatory functions. Actors or agents will be given a certain role that is circumscribed by the situation itself and overall policy contours. The roles given to certain actors, in this case the public, will not be placed on an equal footing as the government. Rather, government and public act in concert performing different functions but working toward a common goal. A certain actor will be enrolled on the basis of what it can provide to the regulatory policy framework. Black underlines this idea:

Certain actors, often consumer groups, may deliberately be enrolled in particular aspects of the regulatory process, for example standard setting or the enforcement process, in part because of the legitimacy that it is perceived that they can confer on those processes.¹⁰

The above quotation is particularly useful for this paper as it refers directly to the significance of public interest participation - that is, it lends legitimacy to the standards that are set. Government can facilitate greater third party involvement in pursuit of the public interest, thereby gaining considerable political leverage from harnessing external resources.¹¹ It is a matter of government taking advantage of a naturally occurring phenomenon such as market or social forces that is linked to the public's desire to curb climate change.¹²

The overall purpose of enrolling the public as an actor is to help bridge the divide that exists between public (including government-ed) and private interest. The more divergent public and private interests are on climate change the more difficult it will be for regulation in the form of GHG reduction legislation to bridge the gap. This inevitably means any such legislation will be given a particularly hostile reception, which will ultimately undermine its effectiveness. In order to try to remedy such a situation it is important to recognise the forces acting outside the direct relationship of the regulator and regulated. The pressure brought to bear upon private business by an informed public imbued with ambitions of government policy to change its carbon liabilities to conform to an overall view of ethical standards can be powerful. This idea of bridging values can be observed in the work of Braithwaite and Drahos who emphasise the importance of 'principles' in regulatory policy.¹³ Two aspects of the approach of these scholars are useful to the current topic: the

¹⁰ Black, above n 4, 76.

¹¹ Gunningham and Grabosky, above n 6, 16.

¹² Ibid, 10.

¹³ Braithwaite J and Drahos P, *Global Business Regulation*, (2000, Cambridge University Press).

idea that principles evolve from the values and practices of a group of regulatory actors, and the operation of principle as a 'mutual orientation between actors'.¹⁴ This supports the idea of bridging the public/private divide. When one set of values, for example public values, pressures a change in private values it means that the direction of regulation has been decided.¹⁵ Once this is achieved detailed 'rules of conduct', which in this case is legislation mandating GHG emissions reductions, can be imposed by the government.

The definition of 'public' used in this paper basically absorbs two applications of third party interest used by Gunningham and Grabosky: public interest groups and commercial third parties. In order to properly understand the significance of these roles regard must be given to the way in which government can enhance its effectiveness through 'judicious' policy.¹⁶ It is quite useful in the context of climate change regulatory policy to conflate these ideas because of the all pervasive nature of GHG emissions. Given that virtually all facets of society contribute in some way to the problem of GHG emissions and climate change the range of activities that are relevant is extremely broad. The definition of 'public' can also be stretched which means that the role of the public both in terms of causing GHG emissions and conversely its capacity to reduce such emissions is diversified. The public can therefore be engaged as a regulating force in many different guises, such as moral and ethical conscience and 'green consumerism.'

Green consumerism has become a launch pad for implementing climate change regulatory policy. It has taken centre stage to such an extent that green politics has been reduced to ethical consumerism.¹⁷ It is often closely tied to ideas of carbon offsetting and reduction of carbon footprints. Each of these initiatives imbues the public with a sense of empowerment. The burden of responsibility is placed upon public consumers but there are tools with which people can dispense with this role. Many of these 'doing your bit' activities must be balanced against problems such as over-consumption and must also be seen in the greater context of GHG emissions. The empowerment issue must be handled very delicately by government policy objectives. If the problem of reducing GHG emissions is viewed by the public as being too daunting then motivation to try to change behaviour will dissipate. For example, sections of the public resent any recommendations that suggest reducing the threat of climate change will require serious changes of lifestyle. Therefore government policy takes an approach that highlights the prospect of GHG reduction at very little cost. The danger of this approach is consistently pounced upon by environmental groups who believe it simply reinforces the idea that it is acceptable to consume although in a less insidious way.¹⁸ This criticism must be taken

¹⁴ Ibid 19.

¹⁵ Ibid 19.

¹⁶ Gunningham and Grabosky, above n 6, 94.

¹⁷ J Harris, "The great global coal rush puts us on the fast track to irreversible disaster", *The Guardian*, <<http://www.guardian.co.uk/commentisfree/2007/aug/30/climatechange.energy>> at 2 September 2007.

¹⁸ Gunningham and Grabosky, above n 6, 109.

seriously as it threatens the credibility of public action initiatives. George Marshall, founder and director of projects at the Climate Outreach and Information Network, argues that making climate change solutions easy - such as placing a TV on standby, recycling plastic bags or sharing baths - is 'no guarantee that anyone will carry them out'.¹⁹ The Institute of Public Policy Research (IPPR) goes further arguing that simple actions 'easily lapse into "wallpaper" - the domestic, the routine, the boring, the too-easily understood and ignorable.'²⁰ The upshot is that such gestures might not necessarily result in changes in behaviour.

It must be remembered that the overall regulatory process of using the public to bring external pressure onto private interest necessarily includes a role for government. This role is largely neglected in regulatory scholarship. Through a range of activities including guiding market forces, the government can influence sectors of the public thereby facilitating pluralistic regulatory activity. There are a number of ways in which governments can actively assist public interest groups. A typical method is for government to supply funding or subsidies for public activities which it endorses. However, in relation to the overall climate change policy identified in this paper neither of these measures represents the government's most meaningful contribution. It is acknowledged that subsidies are used for initiatives such as solar hot water rebates but the primary role for government is the provision of information. Information is the lifeblood of public interest groups and is the basis upon which the public conscience will develop and set standards for behaviour. Public interest cannot exert any meaningful pressure or influence unless it feels informed and educated about the issue. In relation to climate change the public uses information to assess what levels of GHG emissions are deemed an acceptable risk and what changes in activity are required to achieve the necessary reductions. This type of action can expose the carbon liability of private companies and in turn makes the company aware of a negative public backlash if they fail to change their policies on GHG emissions.

Enrolling the public as a regulatory agent or force is only part of the overall climate change policy. Such a policy is dependent in large part upon government implementation for its operation. This highlights not only the capacity of the public to influence behaviour but also reflects a change in our understanding of the role of government in climate change regulation. The use of the public as a regulatory force to help foster a change in behaviour is characterised by manipulation and judicious decision making. It can be safely said that ethical consumer behaviour has indicated a growing environmental conscience in relation to a number of issues. Ethical consumer preference is a powerful market tool as products or services that fail to satisfy certain environmental standards risk being boycotted by consumers. Due to the global nature of climate change the negative effects of GHG emissions can be seen as having a direct impact on the consumer. In this sense consumers do

¹⁹ G Marshall, "Can this really save the planet", *The Guardian*, <<http://www.guardian.co.uk/environment/2007/sep/13/ethicalliving.climatechange>> at 13 September 2007.

²⁰ Quoted in *Ibid.*

not just view environmental damage as an ethical or moral concern but also as a direct risk to their personal health and safety. Companies that can demonstrate compliance with key environmental standards stand to profit as they will attract the business of ethical consumers.

III PUBLIC MOTIVATED ACTION IN THE CLIMATE CHANGE ARENA

As climate change issues have become increasingly relevant to market interests a new form of engagement between environmental concerns and private business interests has developed. This has presented opportunities for public interest groups to enter into dialogue with private business and in particular try to influence behaviour to accord with social and ethical standards on carbon liability and GHG emissions. Given the ‘sex appeal’ of the climate change debate in the media this interaction between public and private interest is highly visible. It does not necessarily follow however that the interaction will be free from conflict. At this juncture it is helpful to refer to the approach of Braithwaite and Drahos who state that the ‘conflict of principles’, that is the successful weighing of one principle over another, has consequences for the outcome of regulatory change.²¹

As mentioned in the preceding section of the paper, government provision of information is fundamental to the inclusion of public interest as a regulatory force. When discussing the relationship between public and private interest, access to information is closely associated with transparency and accountability. Simple initiatives include central climate change information services provided by government. A recent example is the efforts of the Scottish Executive.²² Through the Scottish Climate Change Impacts Partnership a new website has been established that will provide the public with free access to updates on the latest research on climate trends.²³ Of more commercial interest are the transparency issues surrounding ‘carbon offsetting’ standards. Offsetting is an activity that is shared by the public and private business interests to different extents. It can be financially beneficial but criticisms highlight fears that offsetting brings about very little reduction in GHG emissions.

Early in 2007 the UK government set standards for the carbon offsetting industry in an attempt to bring greater clarity. In order to alleviate confusion surrounding the effectiveness of schemes the government introduced a set of voluntary standards that had to be fulfilled before a scheme is accredited.²⁴ This requires that projects be assessed in accordance with accountability standards, either the Kyoto Protocol or the EU Emissions Trading System. Offsetting is a very useful example of how the

²¹ Braithwaite and Drahos, above n 13, 19.

²² P Kelbie, “Scotland prepares to fight climate change”, *The Guardian*, <<http://www.guardian.co.uk/environment/2007/sep/02/climatechange.theobserversuknewspages>> at 8 September 2007.

²³ Ibid.

²⁴ H Osborne, “New standards ‘will raise carbon offset costs’”, *The Guardian*, (Thursday January 18 2007).

broadening of environmental markets can increase the inclusion of public interest. The underlying assumption is that the success of the market is inextricably linked to public involvement. The Consultation document produced by the Department for Environment, Food and Rural Affairs (DEFRA) states:

The purpose of establishing a Code is to ensure consumer confidence in an emerging market and continued growth of that market through that confidence. The Code will be voluntary and offset providers can choose whether to seek accreditation for all, or some, of their offsetting products.²⁵

The net benefit to consumers is clearer information regarding how offsets are to be made which allows for a transparent pricing structure which will be supported by guidelines provided by DEFRA. David Miliband, the Secretary for the Environment at the time the standards were introduced, acknowledged that offsetting is not an answer to climate change and that energy reduction remained the chief priority.²⁶

Whilst the government acknowledges the limits upon carbon offsetting it regularly emphasises the educational purposes of its offsetting program:

Government acknowledges that carbon offsetting...can help raise awareness and reduce the impacts of our actions.²⁷

Furthermore, this education campaign is an example of imbuing the public and consumers with government prescribed values with the intention of influencing behaviour in the private sector:

Establishing a voluntary Code that mirrors Government's own criteria for offsetting is designed to encourage others to move towards the use of standardised, verified and transparent carbon emissions reductions from the regulated market. This is particularly appropriate for those industries who would like to be included in international Emissions Trading Schemes in the future.²⁸

These values have been carried over into direct engagements between public interest and corporations. Once again the intensity of this relationship has increased as climate change issues become more intertwined with market forecasts. A combination of moral standards and economic pressure caused mainly by government attempts to price carbon have led to the call by stakeholders for cleaner, more sustainable investment. This attitude helped establish the Carbon Disclosure Project (CDP).²⁹ The CDP is an international framework that allows companies to report their carbon liabilities and gives consumers the opportunity to

²⁵ Department for Environment Food and Rural Affairs (DEFRA), *Consultation on establishing a voluntary Code of Best Practice for the provision of carbon offsetting to UK customers*, (January 2007), p 2 <www.defra.gov.uk> at 30 August 2007.

²⁶ Osborne, above n 24.

²⁷ DEFRA, above n 25, 7.

²⁸ Ibid 10.

²⁹ See <<http://www.cdproject.net/>>

see which companies are potentially high risk in terms of GHG emissions. The CDP identifies its own role as creating a lasting relationship between shareholders and corporations by facilitating a dialogue supported by quality information.³⁰ The information requests made by the CDP and the responses received from corporations are then made publicly available with the intention of assisting policy makers, stakeholders and consultants. Unfortunately the track record of Australian companies participating in the CDP has generally been poor.³¹ Whilst 94 per cent of companies surveyed in Australia and New Zealand stated they had knowledge of climate change, only 25 per cent displayed a sophisticated understanding of this risk³² and only 9 per cent of respondents provided full disclosure of their emissions with third party verification.³³ In terms of ‘responsibilities’ despite 67 per cent stating that they disclose or plan to disclose information regarding GHG emissions, only 31 per cent showed that they had set up clear accountabilities within their company for the management of climate change related issues.³⁴

This sentiment has been observed in the context of Australian corporate law. In terms of ‘corporate social responsibility’ policy makers have favoured the approach of ‘enlightened self interest’ when interpreting directors’ duties.³⁵ This underlines the need for directors to balance the long-term view of a company’s sustainability against short-term profit making.³⁶ It is also recognised that stakeholders can influence the behaviour of a company. The Global Reporting Initiative adopts a similar definition of stakeholder to the one used in this paper:

Those groups or individuals:...(b) whose actions can reasonably be expected to affect the ability of the organisation to successfully implement its strategies and achieve its objectives. This would include shareholders, financiers and creditors, employees, consumers, adjacent communities, NGOs.³⁷

The issue remains as to what extent a company director has to take these considerations into account. There are useful examples surrounding the risk associated with corporate reputation such as the dispute between the Rainforest Action Network (RAN) and Citigroup. Whilst this particular incident involved an organised NGO, the campaign protesting Citigroup’s role in the destruction of old growth forests eventually led, among other things, to Citigroup adopting a comprehensive environmental policy that, among other things, deals with climate

³⁰ See <<http://www.cdproject.net/aboutus.asp>> at August 29 2007.

³¹ This sentiment is shared by Bubna-Lutic, above n 2, 273.

³² Carbon Disclosure Project, *Carbon Disclosure Report 2006 Australia and New Zealand*, p 32 – available at <<http://www.cdproject.net/reports.asp>> at August 5 2007.

³³ Ibid 42.

³⁴ Ibid 40.

³⁵ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (June 2006), <http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/report/index.htm> at 18 August 2007.

³⁶ Bubna-Lutic, above n 2, 257

³⁷ Global Reporting Initiative, *G3 Sustainability Reporting Guidelines* (2006), 41 quoted in Bubna-Lutic, above n 2, 262.

change risk.³⁸ Under the ASX *Principles of Good Corporate Governance* a company is expected to analyse ‘material business risks’ including environmental and sustainability risks where relevant.³⁹ The *Principles* also state that companies must be aware of stakeholders’ expectations as they effect reputation. As argued earlier in the paper, given that the expectation level of the interested public is probably very high, the risk of damage to reputation must be taken seriously. Furthermore the *Principles* point out that effective risk management includes maintaining a company’s good standing with stakeholders and within the community.⁴⁰ The underlying point is that recognition of the obligations that companies have toward stakeholders increases the likelihood of bridging the gap between public and private values as mentioned earlier in this paper.

The CDP also provides an insight that, whilst companies are aware of the pressures demanding change, they have little idea of what actions to take on a long-term basis. The CDP Report observes for example that ongoing regulatory uncertainty in terms of emissions trading makes it difficult for companies to quantify the nature of carbon-related risks and opportunities.⁴¹ Until these measures are taken companies will lack the confidence to invest in long-term changes of behaviour to mitigate their carbon liability and GHG emissions.

Climate Change Related Litigation

There is a growing trend of litigation related to climate change. This is due in some part to the lack of regulation in the form of legislation mandating GHG emissions reductions. The issue of litigation highlights a slightly different form of the relationship between public interest and private commercial interest. Climate change litigation generally features two strands: i) tortious actions against companies or ii) administrative law actions against government agencies which are alleged to have failed in their duties and responsibilities.⁴² The latter scenario crucially involves the government as an actor and this changes the relationship dynamic and the outcomes for regulatory policy. Another important factor is the independence, at least in theory, of the judiciary. As some observers have noticed, climate change litigation is still in its infancy in Australia. An issue worth considering is whether public interest levels of expectation have reached a point where demands for action are now also focused on government itself.

³⁸ Ibid 263.

³⁹ Ibid.

⁴⁰ See *ibid*.

⁴¹ Carbon Disclosure Project, above n 32, 32.

⁴² For a more in depth discussion of this idea see Peel, above n 1.

The *Anvil Hill*⁴³ case best represents some of the concerns mentioned above. As Jacqueline Peel points out, the recent climate change litigation shows the judiciary's willingness to consider the long term and indirect impacts of GHG emissions.⁴⁴ Importantly in the *Anvil Hill* case Pain J viewed GHG emissions in the larger context of Ecological Sustainable Development, thereby highlighting climate change as a central issue in the assessment of environmental impacts of development.⁴⁵ This approach could have repercussions throughout each respective jurisdiction within Australia. There are limits upon how much can be achieved through litigation but its potential to motivate both government and private interest to take action regarding climate change related issues cannot be doubted. This relates to the above point about corporate responsibility as the potential threat of public interest litigation can influence behaviour and decisions.⁴⁶

IV GOVERNMENT ACTION AND THE PROSPECT OF CENTRALISED REGULATION

A number of governments have begun the process of designing legislation aimed at regulating GHG emissions. Certain programs are targeting different aspects of climate change related activity but all are in some way contributing to the overall objective of reducing GHG emissions. It appears that a common theme is making the government a more visible regulatory agent and centralising much of the activity, such as GHG emissions reporting which until now has been rather dispersed. In order to underline this common theme the paper will look at initiatives from a number of different countries and jurisdictions. As part of this the role of the public interest as a regulatory force could become somewhat tempered or circumscribed under the operation of the legislation. Conversely, this means that the government's role in terms of responsibility and expectation is also heightened. Performing such a prolific role requires closer scrutiny in terms of compliance and enforcement of relevant actions. As was discussed in the previous section, there is a good chance that these actions could potentially be a target for public interest litigation where government is viewed as having failed to properly discharge their duties in relation to climate change.

This issue has been highlighted as part of the debate surrounding the draft Climate Change Bill 2007 in the UK.⁴⁷ The purpose of the Bill is to provide the legal framework to reduce actual levels of GHG emissions in the UK. The operation of the Bill is different in the sense that it imposes a legal duty on the secretary of state

⁴³ *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480 (20 September 2007) "In her judgment on the *Anvil Hill* case, Pain J accepted the applicant's argument that GHG emissions from the burning of coal to be extracted from the new mine should have been considered in the proponent's environmental assessment because of their potential contribution to climate change/global warming", Peel, above n 1, 99.

⁴⁴ Peel, above n 1, 104.

⁴⁵ Ibid 104.

⁴⁶ Ibid 104 – 105.

⁴⁷ The Joint Committee on the Draft Climate Change Bill, *Report on the Draft Climate Change Bill* (3 August, 2007).

to reduce GHG emissions by 60% by 2050.⁴⁸ Critics of the draft Bill have observed that the enforcement measures for this duty remain unclear. Specifically the Joint Committee recommended that compliance with the legal duty be more transparent and accord to the expectation levels of the public:

Failure by the government to meet a carbon budget or an annual milestone should trigger a duty to prepare a report explaining the reasons for the non-compliance and an action plan for remedying the situation.⁴⁹

The Committee also recommended that the failure to meet objectives should be reviewable by the judiciary. If a target for a certain year is missed the remaining cuts to GHG emissions must be carried over to the next year. It has been recommended that the judiciary is given the power to compel the secretary of state to outline remedial measures the government will take in the event that it does not meet targets to reduce GHG emissions in a given year.⁵⁰ This idea revolves around the duty placed upon the secretary of state to ensure that there is a 60% reduction in GHG levels by 2050.⁵¹ This is contained in clauses 1(1) and 2(1(b) of the draft Bill. Some observers have expressed reservations as to whether these duties can be enforced in court as the emissions reduction target is not something that can be guaranteed.⁵² This duty to achieve GHG reduction targets is best characterised as a duty of the secretary of state to use his or her best endeavours to achieve the target.⁵³ A failure to reach the target does not therefore necessarily mean a breach of a *legal* duty. Whilst the imposition of statutory duties upon public authorities is a familiar concept, in terms of GHG emissions it is a novel issue. The global nature of emissions means that the ability to meet a reduction target is not completely within the control of a person invested with the duty to do so. Consequently clauses 1(1) and 2(1(b) are *political* obligations under which only the general public and Parliament can hold the government accountable.⁵⁴ Judicial review is ill equipped to deal with issues relating to targets as it is not a means of reviewing “bigger picture politics.”⁵⁵ This appears to cut off a major avenue for public interest action in influencing government to take required measures to reduce GHG emissions. Interestingly, the committee also remarked that in the absence of legal intervention for failure to meet targets:

...the real accountability and sanctions involved here are the risks of adverse public opinion, a bad press and Parliamentary pressure.⁵⁶

⁴⁸ Ibid 28.

⁴⁹ Lord Puttnam, Chair of Joint Committee on the Draft Climate Change Bill, quoted in, P Wintour, “Judges should enforce climate bill targets say MPs”, *The Guardian*, <<http://www.guardian.co.uk/environment/2007/aug/03/1>> at August 5 2007.

⁵⁰ The Joint Committee on the Draft Climate Change Bill, above n 46, 39.

⁵¹ Ibid 39.

⁵² Ibid 39.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid 40.

⁵⁶ Ibid 39.

Furthermore, Rodney Austin stated that:

Governments should not pretend that they are establishing a legally enforceable regime of carbon emissions reductions, thereby falsely laying claim to the credibility and legitimacy which the principle of legality, the cornerstone of the rule of law, confers.⁵⁷

The role of carbon reporting has also been assumed by government as part of its attempts to centralise regulation of climate change policy. Under the UK draft Bill a Climate Change Committee is to be set up which will prepare an annual progress report in relation to GHG emissions targets and advise the secretary on how to achieve the relevant targets. An important recommendation is to allow the Committee to investigate the full scope for sector by sector emissions, otherwise the program will suffer from a lack of credibility.⁵⁸ Another pressing concern is whether the Climate Change Committee should be required under the legislation to make its findings public. Currently the Bill leaves the degree of transparency of reports at the discretion of the Climate Change Committee, which means much of the information upon which government decisions are made might never be made public.⁵⁹ Furthermore there remain questions about the independence of the Climate Change Committee, especially in relation to climate change modelling and forecasting. Government representatives have claimed that the Climate Change Committee does have the capacity to use climate change modelling information from sources independent of government.⁶⁰ The government includes the Office of Climate Change as an independent source - however these claims are dubious as the Office is governed by a Ministerial Board which is chaired by the secretary of state for the environment.⁶¹ Doubts surround the accuracy of government provided modelling techniques which makes it important for the credibility of the scheme that the Climate Change Committee has full and uncompromised access to independent information.⁶²

Carbon reporting is also the focus of Australian government legislation. The *National Greenhouse and Energy Reporting Bill 2007* (Cth) sets up a streamlined national framework for reporting GHG reduction actions undertaken by corporations.⁶³ It establishes the basis upon which the federal government (at the time) intended to develop an Australian Emissions Trading System.⁶⁴ Under the operation of the Bill corporations are required to maintain and provide reports and disclose information. The framework ensures that there is consistency in GHG emissions reporting throughout the country. The government maintained in policy

⁵⁷ Rodney Austin, quoted Parliamentary Brief, March 2007, reproduced in The Joint Committee on the Draft Climate Change Bill, above n 46, 40.

⁵⁸ The Joint Committee on the Draft Climate Change Bill, above n 46, 47.

⁵⁹ Ibid 47.

⁶⁰ Ibid 51.

⁶¹ Ibid.

⁶² Ibid.

⁶³ *National Greenhouse and Energy Reporting Bill 2007* (Cth), Explanatory Memorandum, 5.

⁶⁴ Ibid, 5.

documents that the need for consistent reporting meant that a central regulatory scheme backed with the force of legislation had to be adopted.⁶⁵ The need for consistent reporting is also motivated by the pressure brought by public interest.⁶⁶ It is recognised that public scrutiny of companies' emissions may encourage GHG emissions reductions. Therefore it is crucial that in the interest of credibility all corporations follow a set of reporting standards that is both consistent and therefore comparable to other corporations.

Similar provisions exist under the bill endorsing the *Climate Stewardship and Innovation Act 2007* in the US.⁶⁷ The purpose of the Act is to reduce GHG emissions through a market-driven system of tradeable permits. As part of the operation of the Act each entity⁶⁸ covered must submit annual reports outlining their GHG emissions.⁶⁹ The reports are then added to a national database. This database will be a largely cooperative effort between the Administrator, government representatives, the private sector and NGOs.⁷⁰ The purpose of the database is to collect, analyse and most importantly verify information on GHG emissions submitted by relevant entities through a system of reporting established by the legislation.⁷¹

The Bill ensures that consistency is maintained in reporting standards. Setting these standards will be the responsibility of the Administrator in cooperation with other government representatives. As Lyster points out these measurement and verification methods must be established by rule and importantly include a process for public participation.⁷² Failure to comply with these reporting provisions means that an entity cannot use its registered emissions reductions and fulfil their legal obligations.⁷³ The Bill states that the information contained in the database will be published and accessible to the public, with the crucial exception of information that could jeopardise national security or compromise confidential business information.⁷⁴

The obligation for reporting is also placed upon the Administrator himself. The legislation requires the Administrator to produce an annual report including

⁶⁵ Council of Australian Governments Greenhouse and Energy Reporting Group, *A national system for streamlined greenhouse and energy reporting by business, Regulation Impact Statement*, (November, 2006), 13.

⁶⁶ Ibid 17.

⁶⁷ *Climate Stewardship and Innovation Act of 2007*, 110th Congress, 1st Session, s.280, (January 12, 2007), <<http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00280>> at July 22 2007.

⁶⁸ A covered sector includes the electricity, transportation, industry and commercial sectors. A covered entity means an entity that owns or controls a source of GHG emissions and emits from a single facility over 10,000 metric tons of GHG per year.

⁶⁹ *Climate Stewardship and Innovation Act* s 102.

⁷⁰ R Lyster, "Chasing down the climate change footprint of the public and private sectors: Forces converge" (2007) EPLJ 281 at 294.

⁷¹ Ibid 294.

⁷² Ibid 295; *Climate Stewardship and Innovation Act*, s 104(c).

⁷³ Ibid 295.

⁷⁴ *Climate Stewardship Act and Innovation Act* s 103.

information on total GHG emissions and reductions as stated in the database, sectoral analysis, atmospheric concentration of GHG and the GHG trading activity for the year.

V CONCLUSION

This paper has demonstrated that public interest has been utilised as a powerful regulatory force as part of climate change policy. Whether this regulatory force will be maintain its momentum in the face of direct regulation in the form of legislation is the key question. It will be difficult to circumscribe the role of the public because the climate change debate is becoming increasingly visible and citizens feel they have a direct interest in any proposed solution. For the government it is clearly a question of balance. Though government will be somewhat reluctant to foster a situation where public legal action is launched with some regularity it needs to ensure that it does not lose the legitimacy and credibility that can only be gained through public support for regulatory programs. Government is moving toward centralising regulation on climate change and to remain effective it must ensure that it allows the public the capacity to influence behaviour and effect change.